

**STATE OF MICHIGAN
IN THE SUPREME COURT
Appeal from the Court of Appeals
Honorable Cooper, P.J. and Hoekstra and Markey, J.J.**

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

vs

Supreme Court No. 123537

RODNEY WILLIAMS,

Defendant-Appellee.

Circuit Court No. 00-4026
Court of Appeals No. 232827

**PLAINTIFF-APPELLANT'S BRIEF ON APPEAL
ORAL ARGUMENT REQUESTED**

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research,
Training and Appeals

JON P. WOJTLA (P-49474)
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5796

TABLE OF CONTENTS

	<u>Page</u>
Index of Authorities	iii
Statement of jurisdiction and order appealed from	1
Statement of Questions Presented	1
Statement of Facts	2
Argument	
I. For a valid waiver of the right to counsel, the trial court must question defendant to ensure the waiver is unequivocally, knowingly, intelligently, and voluntarily made. Here, the trial court informed defendant of the charges and the maximum sentence for each charge, advised him of the risks involved, warned him that he would not be allowed to disrupt the proceedings, and questioned him about whether he actually wished to represent himself. The trial court ensured that defendant waived his right to counsel unequivocally, knowingly, intelligently, and voluntarily.	5
Standard of Review	5
Discussion	6
Relief	18

INDEX OF AUTHORITIES

<u>CASE</u>	<u>Page</u>
<i>Arizona v. Fulminante</i> , 499 US 279, 111 S Ct 1246, 113 L Ed 2d 302 (1991).	15
<i>Commonwealth v. Jackson</i> , 647 NE2d 401 (Mass. 1995).	14
<i>Faretta v. California</i> , 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975)	6, 7, 14
<i>Gideon v. Wainwright</i> , 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).	15
<i>Godinez v. Moran</i> , 509 US 389, 113 S Ct 2680, 125 L Ed 2d 321 (1993).	14
<i>Johnson v. Zerbst</i> , 304 US 458, 58 S Ct 1019, 82 L Ed 1461 (1938)	5, 8, 14
<i>People v. Adkins</i> , 452 Mich 702 (1996)	5, 8, 10
<i>People v. Ahumada</i> , 222 Mich App 612 (1997).	5
<i>People v. Anderson</i> , 398 Mich 361 (1976)	PASSIM
<i>People v. Dennany</i> , 445 Mich 412 (1994)	PASSIM
<i>People v. Dunn</i> , 380 Mich 693 (1968).	9
<i>People v. Lopez</i> , 138 Cal.Rptr. 36 (1977).	8
<i>People v. Morton</i> , 175 Mich App 1 (1989).	7

INDEX OF AUTHORITIES

<u>CASE</u>	<u>Page</u>
<i>People v. Ratliff</i> , 424 Mich 874 (1986)	12
<i>People v. Rice (On Remand)</i> , 235 Mich App 429 (1999).	8
<i>Spalding v. Spalding</i> , 335 Mich 382 (1959).	5
<i>Satterwhite v. Texas</i> , 486 US 249, 108 S Ct 1792, 100 L Ed 2d 284 (1988).	15
<i>United States v. Hill</i> , 252 F3d 919 (CA 7, 2001).	15
<u>CONSTITUTION</u>	<u>Page</u>
Constit 1963, Art 1 § 13	6
<u>COURT RULES</u>	
MCR 6.005(D)	9, 13
<u>STATUTE</u>	
MCL 763.1	6

STATEMENT OF JURISDICTION AND ORDER APPEALED FROM

The People appeal under MCR 7.301. The People are appealing the Court of Appeals's February 28, 2003 opinion, Judge Joel P. Hoekstra dissenting, reversing defendant's conviction and remanding the case back to the Third Circuit Court for a new trial. The People asked this Court for leave to appeal the Court of Appeals's opinion. On July 3, 2003, the Court granted leave to appeal.

STATEMENT OF QUESTIONS PRESENTED

I.

For a valid waiver of the right to counsel, the trial court must question defendant to ensure the waiver is unequivocally, knowingly, intelligently, and voluntarily made. Here, the trial court informed defendant of the charges and the maximum sentence for each charge, advised him of the risks involved, warned him that he would not be allowed to disrupt the proceedings, and questioned him about whether he actually wished to represent himself. Did the trial court ensure defendant waived his right to counsel unequivocally, knowingly, intelligently, and voluntarily?

The People answer: "YES".

Defendant answers: "NO".

The trial court answered: "YES".

The Court of Appeals answered: "NO".

STATEMENT OF FACTS

On March 14, 2000, Florian Mager was working as a delivery person for Bob's Pizza Palace. At approximately 11:50 p.m., Mager was making his final delivery of the night at 18401 Harlow Street in Detroit. (74a)¹ After looking around the area for anything suspicious, Mager approached the house and knocked on the door. While Mager waited at the door, he noticed two men walking up the street towards him. The men cut across the grass and up to the porch behind Mager. (78a) Mager believed that the men probably lived at the house and moved to one side. One of the men, defendant Rodney Williams, stepped onto the porch and grabbed Mager's shoulder. Defendant turned Mager toward the door and put a handgun to Mager's head. (79a) A few seconds later, the door to the house opened. (81a) Defendant told the person who opened the door to get back into the house. Defendant pointed the gun at the person who opened the door and fired once through the storm door. (81a) Defendant turned back to Mager and demanded money. (82a) Mager took out his money and handed it to defendant. (84a) Defendant and the other man ran from the porch and down the street. Inside the house, Tracey Jo Williams heard the gunshot and ran to the back room. (110a) Williams called out from the room for her boyfriend, Jerry Jones. Jones had gone to the door right before the gunshot to pay for the food he ordered. Jones told Williams that he was shot. (111a) Williams came out of the room and dragged Jones into bed. Jones told Williams to call 911 and then a girl named Geisha. Jones talked to Geisha and hung up the phone. (115a) Jones told Williams that he was going to die.

¹References to the trial record will be cited by the page the reference appears in the Plaintiff-Appellant's Appendix.

(115a) Williams asked Jones what had happened. Jones told her that her brother, Rodney, shot him. (116a) Jones eventually died from the gunshot wound to his abdomen. (73a)

Later that same day, Mager appeared at police headquarters to view a live line-up. After viewing the line-up, Mager identified defendant as the robber. (86a) Evidence technicians from the Detroit Police conducted a Gunshot Residue Test on defendant's skin and clothes. (156a) The technicians found one particle on defendant's right hand that was consistent with gunshot residue. (161a)

On December 5, 2000, a jury trial commenced in the Third Circuit Court for Wayne County, the Honorable Diane Hathaway presiding. The criminal information charged defendant with one count of First Degree Felony Murder, one count of Armed Robbery, and one count of Felony Firearm. Donald Cook represented defendant at the beginning of the trial. On the second day of trial, December 6, 2000, the trial court took testimony before breaking for lunch. When the trial resumed after lunch, defendant indicated that he wished to remove Mr. Cook as his attorney. (2a) Defendant stated that if faced with a choice between proceeding with Mr. Cook or representing himself, defendant would choose self-representation. (8a) Judge Hathaway questioned defendant about his choice and allowed him to finish the trial as his own attorney. On December 14, 2000, the jury found defendant guilty as charged. On January 17, 2001, Judge Hathaway sentenced defendant to a term of natural life imprisonment consecutive to the mandatory two year sentence for Felony Firearm. The Armed Robbery conviction was vacated.

Defendant appealed as of right. Defendant claimed he was denied his right to counsel when the trial court denied his request for substitute counsel and failed to secure a valid waiver of counsel. Defendant additionally challenged the trial court's decision denying defendant the

opportunity to admit evidence. Defendant also claimed his counsel was ineffective in his cross examination of the People's witnesses. Finally, defendant claimed he was deprived of a speedy trial.

On February 28, 2003, the Court of Appeals, by a 2 to 1 vote, reversed defendant's conviction. The majority of the Court found that defendant did not unequivocally waive his right to counsel at trial. The majority read the trial record to find that defendant was rushed into making his decision after the trial court denied him the opportunity to read a portion of the preliminary examination transcript. The majority felt that if defendant had read the transcript, he may not have decided to waive his counsel. Judge Joel P. Hoekstra dissented finding that defendant's request to read the transcript was related to his desire to recall witnesses and not to his desire for self-representation. Judge Hoekstra found that the trial court had already fully complied with the necessary requirements for ensuring an unequivocal waiver and defendant had already repeatedly stated his desire to represent himself by the time any discussion of the transcript was raised. Thus, the waiver was voluntary and unequivocal.

The People applied to this Court for leave to appeal the Court of Appeals's opinion. The People claimed that the Court of Appeals erred in finding that defendant did not unequivocally waive his right to counsel at trial. On July 3, 2003, the Court granted the People's application.

ARGUMENT

I.

When a defendant requests to waive his right to counsel, the trial court must question him to ensure the waiver is unequivocally, knowingly, intelligently, and voluntarily made. Here, the trial court informed defendant of the charges and the maximum sentence for each charge, advised him of the risks involved, warned him that he would not be allowed to disrupt the proceedings, and questioned him about whether he actually wished to represent himself. The trial court ensured that defendant waived his right to counsel unequivocally, knowingly, intelligently, and voluntarily.

Standard of Review

The determination whether self-representation is appropriate is a matter within the discretion of the trial judge.² The trial court's decision to allow defendant to proceed in pro per is reviewed for an abuse of that discretion.³ In the oft used language of *Spalding v. Spalding*⁴:

The idea of discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.⁵

²*People v. Adkins*, 452 Mich 702, 721 (1996); *Johnson v. Zerbst*, 304 US 458, 465, 58 S Ct 1019, 82 L Ed 1461 (1938).

³*People v. Ahumada*, 222 Mich App 612, 617 (1997).

⁴*Spalding v. Spalding*, 335 Mich 382 (1959).

⁵*Id.* at 384-385.

Discussion

On the second day of trial, after several witnesses had already testified, defendant asked the trial court for a new attorney. This was the first time defendant had ever indicated to the court that he was unhappy with his counsel, Donald Cook's, representation. Cook substituted into the case when defendant's first attorney withdrew due to a breakdown in the attorney-client relationship. Defendant asserted that Cook was allowing the prosecution witnesses to testify and failing to cross examine them with pertinent questions. (2a) In short, defendant complained that he had no confidence in Cook and wanted a new attorney. Defendant stated he understood that the trial was in progress so he did not want an adjournment. Instead, defendant wished to represent himself, in pro per.

Defendant is guaranteed the right to self-representation. The United States Constitution implicitly grants defendants the right to waive their right to counsel and proceed in propria persona.⁶ The right to self-representation is explicitly granted in Michigan by the Constitution and by statute.⁷ This right is not absolute however.⁸ Defendant does not have the right to exercise both his right to counsel and his right to self-representation. The exercise of one right requires the knowing and voluntary waiver of the other.⁹ The danger exists therefore that an

⁶*Faretta v. California*, 422 US 806, 95 S Ct 2525, 45 L Ed 2d 562 (1975).

⁷Const 1963, Art 1, §13 ("A suitor in any court of this state has the right to prosecute or defend his suit, either in his own proper person or by an attorney."); MCL 763.1 ("On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself . . .").

⁸*People v. Anderson*, 398 Mich 361, 366 (1976); *Ahumada*, supra at 616.

⁹*People v. Dennany*, 445 Mich 412, 444 (1994).

incomplete waiver of the right to counsel on the record will result in a violation of not one, but both constitutional rights. For this reason, self-representation is a favored issue in criminal appeals. Defendants see the potential to use the competing constitutional rights to create an appellate parachute. This is especially true in situations similar to the one at bar where the request to represent oneself is made in the midst of trial and in response to a request for substitute counsel. If the trial court allows the defendant to represent himself, the defendant can return on appeal claiming that he involuntarily waived his right to counsel under the duress of continuing trial with an ineffective counsel or that he did not fully understand the dangers of representing himself.¹⁰ If the trial court denies the defendant's request to waive counsel, defendant can return to claim he was deprived of his right to self-representation and deprived of his right to effective assistance of counsel. The defendant's use of this appellate parachute is frequently derided as making a mockery of the criminal justice system and should not be permitted.¹¹ "[T]o indulge in the charade of insisting on a right to act as his own attorney and then on appeal to use the very permission to defend himself in pro per as a basis for reversal of conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected."¹² As this Court has accurately predicted, the same issue that mocks the justice system is invariably the first issue the unsuccessful defendant raises on appeal.¹³

¹⁰Defendant made both of these claims. Defendant's motive to create an appellate parachute is evident from his sudden accusation following his conviction that he was forced to represent himself against his will. (361a)

¹¹*Dennany*, supra at 436; See also, *Faretta*, supra at 846 (Burger, C.J., dissenting).

¹²*People v. Morton*, 175 Mich App 1, 8-9 (1989).

¹³*Dennany*, supra at 437.

“[W]hether the prospective pro per is a naive character who sincerely believes he can represent himself . . . a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision.”¹⁴

To combat the appellate parachute, trial courts must thoroughly question the unhappy defendant at trial to methodically assess defendant’s wisdom and volition in waiving his attorney.¹⁵ To achieve this, the trial court must determine that the defendant not only wishes to represent himself but intends to abandon any right to the representation of counsel. The trial court will indulge every reasonable presumption against a waiver of counsel.¹⁶ The trial court, however, is entrusted with the final determination of whether the defendant is voluntarily waiving his right and proceeding on his own.

Understanding the treacherous waters the trial court must tread to allow a defendant to exercise his right to self-representation while at the same time ensuring that defendant’s right to counsel is not arbitrarily abandoned, substantial compliance with certain requirements is all that is required to determine whether the waiver of counsel was knowingly, understandingly, and voluntarily made.¹⁷ The trial record must show that the defendant was offered counsel but

¹⁴*Dennany*, supra, quoting, *People v. Lopez*, 138 Cal.Rptr. 36 (1977).

¹⁵*People v. Adkins*, 452 Mich 702, 721 (1996).

¹⁶*Johnson v. Zerbst*, supra at 464.

¹⁷*Adkins*, at 726; *People v. Rice (On Remand)*, 235 Mich App 429, 433 (1999).

intelligently and understandingly rejected the offer.¹⁸ The Court in *People v. Anderson*, extrapolated three main requirements for the trial court to meet to ensure a proper waiver.¹⁹ First, the defendant's request must be unequivocal. Second, the defendant must assert his right to self-representation knowingly, intelligently, and voluntarily. Third, the trial court must establish that the defendant will not unduly disrupt the court while acting as his own counsel. In addition to these three requirements, the trial court must comply with the requirements of MCR 6.005(D).²⁰ The court rule requires the trial court to advise the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation. The rule also requires the trial court to offer the defendant the opportunity to consult with a lawyer. Taken as a whole, the requirements are meant to ensure that the defendant is waiving his right to counsel with "open eyes." The method the trial court uses to comply with the requirements is left to its discretion. A litany approach is not necessary. The trial court is only required to substantially comply with the requirements by discussing the substance of the requirements in a short colloquy with the defendant and making a finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.²¹ "Where there is error but it is not one of complete omission of the court

¹⁸*People v. Dunn*, 380 Mich 693, 698 (1968).

¹⁹*Anderson*, *supra* at 366.

²⁰*Adkins*, at 722.

²¹*Adkins*, at 727.

rule and *Anderson* requirements, reversal is not necessarily required.”²² Whether a reversal is necessary depends upon the nature of the noncompliance.

The trial court did not abuse its discretion in finding that defendant knowing and intelligently waived his right to counsel. The trial court sufficiently questioned defendant in compliance with the requirements. The method by which the requirements are met is left to the discretion of the trial court. The trial court is in the best position to determine whether the defendant understands his rights and the warnings made to him. In assuring a knowing and voluntary waiver, the trial court must make the defendant aware of the dangers and disadvantages of self-representation.²³ Weighing in favor of a voluntary waiver are the circumstances surrounding the plea. Here, the timing of the request in the midst of the second day of trial indicates defendant was attempting to delay and manipulate the court proceedings. This conclusion is supported by Laurence Burgess’s reasons for withdrawing as defendant’s counsel prior to trial. Burgess explained that defendant wanted to try the case himself by telling counsel what to do. (65a) Defendant’s outbursts against Cook and the court during trial also support this conclusion. (105a) Defendant’s intentional behavior to disrupt the criminal proceedings favors a finding of a knowing and intelligent waiver.²⁴ Once defendant indicated he wished to represent himself, the trial court questioned him to be certain that this was what defendant really wanted to do. Defendant assured the court that he knew what he was doing. (13a) The court told defendant that if the trial did not go the way defendant planned, then defendant could not come

²²*Dennany*, supra.

²³*Anderson*, at 368.

²⁴ *Adkins*, at 723.

back on appeal and claim his own defense amounted to ineffective assistance of counsel. (8a) Defendant was reminded that, although he did not go to law school, he still needed to abide by the Rules of Evidence. (9a) Defendant told the court that he was waiving his counsel knowingly, intelligently, and voluntarily. (9a) The trial court then warned defendant of the serious risks involved in his self-representation. The court told defendant that he was not familiar with the Rules of Evidence, was emotionally involved in the case, and could be harming his case rather than helping. (11a) The trial court asked defendant one last time whether he wanted to represent himself. Defendant once again affirmed his waiver. (13a) The trial court sufficiently questioned defendant to open his eyes to the choice he was making and the dangers of his choice. From defendant's responses, the trial court believed that defendant was knowingly, understandingly, and voluntarily waiving his right to counsel.

The trial court's questioning also satisfied the requirements of MCR 6.005(D). As shown previously, the court made defendant aware of the great risks he was taking in representing himself. The court additionally informed defendant that he was charged with Felony Murder, Armed Robbery, and Felony Firearm. The court told defendant that the maximum possible sentences were life imprisonment for the murder charge, life or any term of years for the robbery charge, and two years for the firearm charge. (10a) The court also indicated that the life sentence for murder and the two year sentence for Felony Firearm were mandatory sentences. The trial court told defendant that Cook would be available to help at trial so defendant could ask him any questions he wanted. (9a) The trial court's questions satisfied the requirements of the court rule.

The trial court established that defendant would not unduly disrupt the court while acting as his own attorney. Defendant promised the court that he would not disrupt the courtroom in any way. (9a) The trial court told defendant if he did disrupt the trial, then Cook would be reinstated as counsel. The trial court inquired into defendant's ability to behave in court and warned him of the consequences of not properly behaving.

The final requirement for a valid waiver of counsel is that the request must be unequivocal. Defendant has a constitutional right to represent himself or to be represented by counsel but not both. The trial court therefore needs to be certain that defendant is unwavering in his want to represent himself. If defendant is equivocal in his waiver of counsel then no waiver exists and the present counsel should continue to represent defendant.²⁵ Defendant told the trial court several times that he was certain he wanted to represent himself. Defendant stated he wanted to represent himself in proper person because he needed to bring out facts that Cook could not. (2a-3a) Given the choice of representing himself or having Cook represent him, defendant chose self-representation. (8a) Defendant continually repeated to the court that he was unequivocal in his choice.

The majority of the Court of Appeals panel found that, despite the trial court's frequent warnings against self-representation and defendant's repeated affirmations that he wanted to waive counsel and proceed on his own, the waiver was equivocal because defendant was not allowed to review the preliminary examination transcript before making his decision. Judge Hoekstra's opinion, however, more closely reflects the colloquy between defendant and the trial court. When he initially requested to waive Cook's representation, defendant made a separate

²⁵*People v. Ratliff*, 424 Mich 874 (1986).

request to recall two prosecution witnesses that had already completed their testimony. After the trial court completed everything required by *Anderson* and MCR 6.005, defendant informed the court that he was knowingly, intelligently, and voluntarily requesting to represent himself. The trial court was ready to proceed with the trial when defendant returned to his earlier request to recall the prosecution's witnesses. (10a) Defendant made the request because he felt Cook did not adequately cross examine these witnesses. Defendant stated that his memory of Florian Mager's testimony at the preliminary examination differed from his testimony at trial. Defendant wanted to recall Mager to bring out that Mager was only 50% certain defendant was the murderer. Defendant very noticeably drew Cook's attention to the alleged inconsistency during Mager's trial testimony. (12a, 106a) After reviewing the transcript, Cook did not find an inconsistency. (12a) Mager testified at the preliminary examination that, at the line-up, he thought defendant looked the closest to the murderer and another person sounded the closest but by the end of the line-up he was sure defendant was the murderer. (56a) Mager's testimony was identical at trial. (101a) Defendant requested to see the transcript because he did not believe the prosecutor's and Cook's interpretation. Defendant's insistence to see the transcript dealt with his request to recall Mager, not with his request to waive counsel. Never did defendant *condition* his waiver of counsel on his ability to recall Mager or review the transcript. Never did defendant say he would retain Cook if the transcript contradicted his memory. Rather than putting the waiver in doubt, defendant's request to see the transcript supports the waiver. Defendant's contention that his memory of the events was most accurate and request for the prosecution to prove him wrong shows that defendant had no faith in Cook and fully believed he could do a better job. Defendant's requests to recall the witnesses and review the examination transcript

establish that defendant wanted the trial to be conducted on his terms and he would not be satisfied with the way Cook was representing him. Defendant's earlier counsel had prophesied that defendant did not want to listen to the advice of counsel and instead wanted to try the case himself. Defendant's repeated affirmation, in the face of adequate warnings from the trial court, that he wished to represent himself and his insistence that he would be his best representative at trial established a substantial assurance of an unequivocal waiver.

Defendant's mistaken belief that he could recall the prosecution's witnesses and ask all the questions he wanted to ask is irrelevant to the question of whether his waiver of counsel was unequivocal. A defendant does not need to have the skill and experience of a lawyer in order to competently and intelligently choose self-representation. "[T]he average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take away his life or liberty, wherein the prosecution is presented by experienced and learned counsel."²⁶ Defendant's legal knowledge and ability are absolutely not a factor in waiving the right to counsel.²⁷ The trial court has no duty to protect a pro per defendant from his lack of legal training.²⁸ The trial court made defendant fully aware that he was unskilled in the rules of evidence and procedure. The court's warnings made defendant aware that he may not be able act the way or present the evidence he wanted. Still, this was a risk defendant seemed ready to take because he believed that he was his best advocate. Defendant knew that he was in uncharted

²⁶*Johnson v. Zerbst*, supra at 462-463.

²⁷*Faretta*, supra at 836; *Godinez v. Moran*, 509 US 389, 399, 113 S Ct 2680, 125 L Ed 2d 321 (1993).

²⁸See, *Commonwealth v. Jackson*, 647 NE2d 401, 405 (Mass. 1995).

waters yet still wished to proceed. That decision cannot be deemed by this Court as involuntary. “[I]n or out of the criminal justice system, people freely assume risks that they do not fully understand . . . yet we do not call these decisions unintelligent; venturing into the unknown with a sketchy idea of what lies ahead may be the wisest choice even when the odds are beyond calculation.”²⁹

If the trial court did commit error in finding a valid waiver of counsel, such an error was harmless. That defendant’s constitutional right to counsel was affected by the trial court’s actions does not require automatic reversal. Automatic reversal is appropriate only if a fundamental and structural error occurred. While all structural errors are constitutional, not all constitutional errors are structural.³⁰ A denial of the right to counsel is a fundamental and structural error when it pervades the entire proceeding casting so much doubt on the fairness of the trial process that, as a matter of law, it can never be considered harmless.³¹ Whether a violation requires automatic reversal depends on the extent that the error pervades the trial.³² A total deprivation of counsel during a critical stage of the proceedings falls into the category of structural error.³³ Here, any defect in defendant’s waiver did not pervade the entire criminal proceeding. Defendant was represented by counsel at all stages leading up to trial. Mr. Cook represented defendant for most of the trial. The prosecution had already questioned the

²⁹*United States v. Hill*, 252 F3d 919 (CA 7, 2001).

³⁰*Arizona v. Fulminante*, 499 US 279, 310, 111 S Ct 1246, 113 L Ed 2d 302 (1991).

³¹*Satterwhite v. Texas*, 486 US 249, 256, 108 S Ct 1792, 100 L Ed 2d 284 (1988).

³²*Id.*

³³*Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963).

important identification witnesses and was close to being competed with its entire case-in-chief when defendant first requested to represent himself. Even after the court allowed him to waive counsel, he was not totally deprived of Cook's assistance. Cook remained as stand-by counsel and provided defendant advice and guidance in presenting his defense. Cook spoke up when it seemed defendant was not fully understanding the court's orders, took part in all discussions with the trial court and the prosecutor at side bar, and aided defendant in making a closing argument. Cook also personally consulted with defendant about trial tactics and procedures. (253a) Cook argued to the court about the instructions to the jury and the form of the verdict sheet. (299a) Defendant was not totally deprived of counsel throughout the criminal proceedings and any defect in the waiver did not pervade the proceedings. No fundamental and structural error exists requiring automatic reversal.

Any defect in the waiver of counsel was harmless error. As mentioned, defendant did have Cook's assistance through probably the most damning part of the trial - when Mager and Tracey Jo Williams both identified defendant as the shooter. The remaining part of the prosecution's proof, during which defendant represented himself, consisted of evidence of an inconclusive gunshot residue test and the testimony of a police officer that questioned defendant about the murder but did not take a statement. None of these later proofs affected the outcome of the trial. Defendant cross-examined the gunshot residue witnesses and brought out matters that the jury could consider questionable about the reliability of the test results. Defendant called himself to the stand. Defendant was able to tell the jury that he was not guilty by presenting a six page monologue of his actions the night of the murder. (190a-196a) The trial court allowed defendant to present evidence of questionable relevance about a prior incident when Tracey Jo

Williams similarly accused defendant of murdering someone. (198a-200a) Defendant was also able to present evidence that the victim was uncertain about who actually shot him and only believed it was defendant. (289a) Unfortunately for defendant, his performance was unable to overcome the substantial and compelling testimony from Mager that he saw defendant shoot the victim and from Tracey Jo Williams that the victim identified defendant as the shooter. Any error the trial court committed in taking defendant's waiver did not affect the outcome of the trial. This Court should reverse the Court of Appeals opinion and affirm defendant's conviction.

RELIEF

WHEREFORE, the People respectfully request this Honorable Court to reverse the Court of Appeals's order and reinstate defendant's conviction.

Respectfully submitted,

MICHAEL E. DUGGAN
Prosecuting Attorney
County of Wayne

TIMOTHY A. BAUGHMAN
Chief of Research, Training, and Appeals



JON P. WOJTALA P49474
Assistant Prosecuting Attorney
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5796

Dated: August 28, 2003.

H:\Jwojtala\b.williams,rodney.sct.wpd